IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No 78-6809

DENNIS SEAY JENKINS, Petitioner

VS

CHARLES ANDERSON, Warden State Prison for Southern Michigan at Jackson, Michigan,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Dennis Seay Jenkins, petitioner, by his attorney, Carl Ziemba, respectfully prays this Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in the case of Dennis Seay Jenkins, petitioner, vs Charles Anderson, warden, State Prison for Southern Michigan at Jackson, Michigan, to review the Order entered in No 79 1011 dated May 4, 1979 affirming the judgment of the District Court which denied petitioner a writ of habeas corpus.

ORDERS BELOW

The Court of Appeals did not issue an opinion. The Order of the Court of Appeals dated May 4, 1979 affirming the judgment of the District Court which denied petitioner a writ of habeas corpus is unpublished; it is appended hereto as Appendix 'A'.

The Order of the Court of Appeals dated May 29, 1979 denying a rehearing to petitioner is unpublished; it is appended hereto as Appendix 'B'.

STATEMENT OF JURISDICTION

The Order of the Court of Appeals affirming the judgment of the district court which denied petitioner a writ of habeas corpus was entered May 4, 1979. Petitioner's motion for rehearing was denied by Order dated May 29, 1979.

The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

'danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.'

QUESTION PRESENTED

Whether consistent with the Fifth Amendment to the United States Constitution a defendant in a state criminal prosecution can be cross-examined concerning his failure to go to the police at a time before his arrest and give the same explanation of self-defense which he gave in testimony on trial.

STATEMENT OF PERTINENT FACTS

Petitioner was charged in a one count information in the Recorder's Court for the City of Detroit, Michigan with the commission of the offense of murder of the first degree in the stabbing death of the victim.

Testimony was adduced reflecting that there was a confrontation on the street between petitioner and the deceased, a struggle ensued, the victim was stabbed in the chest and subsequently died, and petitioner ran away.

A period of two weeks elapsed between the date of the stabbing and the arrest of petitioner. Petitioner surrendered to the police knowing that a warrant for his arrest was outstanding.

Petitioner took the stand in his own defense and on direct examination testified that he had acted in self-defense. On cross-examination, the prosecutor asked petitioner whether he had during the two week period between the stabbing and his arrest 'go[ne] to a Police Officer or to anyone else' and 'reported the things that you have told us in Court today' and also the prosecutor asked petitioner '[w]hen was the first time that you reported the things that you have told us in Court today to anybody'.

In argument to the jury the prosecutor adverted to the fact that petitioner 'waited two weeks . . . before he did anything about surrendering himself or reporting it to anybody'.

Petitioner called two witnesses to support his claim that he had acted in self-defense. On cross-examination of these two witnesses, the prosecutor asked whether they had gone to the police prior to trial to tell the police that petitioner had acted in self-defense; the answers, of course, were that they had not. And in argument to the jury, the prosecutor adverted to the fact that the two witnesses had not gone to the police to tell them that defendant had acted in self-defense.

The jury convicted petitioner of manslaughter; the court sentenced petitioner to a term of 10 years to 15 years. Petitioner remains at date hereof incarcerated in State Prison for Southern Michigan at Jackson, Michigan, Charles Anderson, warden.

The Michigan Court of Appeals affirmed petitioner's conviction on the prosecutor's motion to affirm, and the Michigan Supreme Court denied a discretionary appeal.

Petitioner sought a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, Southern Division; a judgment entered denying the petition for writ of habeas corpus.

Petitioner appealed said denial to the United States Court of Appeals for the Sixth Circuit. By Order, the judgment of the lower court was affirmed.

REASONS FOR GRANTING THE WRIT

The Court of Appeals declined to apply the principle of Doyle v Ohio, 426 US 610 (1976) in the case at bar because the silence about which petitioner was cross-examined was silence adhered to while petitioner was not under arrest. This is what the Court of Appeals said:

> 'The most serious issue raised by petitioner is whether cross-examination as to his silence concerning his defense amounts to a violation of his privilege against self-incrimination as construed in Doyle v. Ohio, 426 U.S. 610 (1976). It appears, however, that unlike the circumstances in Doyle, the petitioner was not questioned concerning his silence while under arrest or otherwise in custody. The petitioner does not complain that his silence was the product of the implicit assurance of Miranda warnings that silence carries no penalty. Doyle, supra, 426 U.S. at 618. We find such a claim foreclosed by our decision in Bradley v. Jago, No. 78-3236, decided and filed March 27, 1979.' [pp2-3, Order].

In Bradley v Jago, 594 F2d 1100, 1103 (CA6 1979), a habeas corpus proceeding out of a state-court conviction, the Court held as follows:

> 'We do not read Doyle to prohibit an attempt to impeach a defendant by cross-examination concerning his failure to offer an exculpatory explanation when the opportunity to do so came before he was in custody and before he had received any advice of his right to remain silent.
>
> * * *
>
> 'Doyle applies to those situations in which a defendant is entitled to rely on the implicit assurance of the Miranda warnings that silence carries no penalty. 426 U.S. at 618. In contrast, where a defendant has not received warnings, there is nothing unfair in permitting jurors to hear that a defendant initially failed to offer his exculpatory version of events after they have heard his version at trial. It is not to be presumed that failure to explain at that ime resulted from an exercise of the Fifth Amendment right to remain silent. The fact that the defendant did not offer the exculpatory explanation when he had an earlier opportunity to do so is evidence which the jury is entitled to hear, and from which it may draw reasonable inferences.'

Thus, the issue is clearly drawn: Does the Fifth Amendment right to silence spring into being only when some police authority informs the defendant that the Fifth Amendment confers upon him the right to remain silent?

The distinction between silence occurring prior to and silence occurring after Miranda warnings has been rejected by three circuits: United States v Impson, 531 F2d 274 (CA5 1976); United States v Henderson, 565 F2d 900 (CA5 1978); United States ex rel Allen v Rowe, 591 F2d 391 (CA7 1979); Bradford v Stone, 594 F2d 1294 (CA9 1979).

There is good reason to reject a distinction between

silence occurring prior to and silence occurring after Miranda warnings. Not to do so would lead to the establishment of the startling principle that an accused under arrest and in custody has greater and better constitutional rights than an accused not under arrest and not in custody.

Before Miranda saw the light of day, an accused had the right to remain silent in the face of questioning whether in custody of the police or not.

Miranda merely requires the police to inform and advise an accused who is in custody of certain rights which the Constitution of the United States grants him. Miranda created no new constitutional rights.

Rights created by the United States Constitution inure to the benefit of all, not only to those who have been arrested.

An accused under arrest and in custody may have the judicially created right to have the police advise him of his Miranda rights, whereas an accused not in custody of the police does not have the right to have the police advise him of his Miranda rights. But this does not mean that the accused who is not in custody does not have the same constitutional rights as does the accused who is in custody. Each has the right under the Fifth Amendment to remain silent and make no statement in the face of accusation of commission of crime.

Any person accused of crime, whether he be in custody or not, has a right under the Sixth Amendment to the United States Constitution to consult with an attorney. Under Miranda, an accused in custody must be advised of the fact that he has this right to consult with an attorney by his custodians. But this does not mean that the accused who is in custody has a better or a different right to consult with an attorney than an accused who is not in custody. Both have the same constitutional right and the substance of that right in both instances is the same.

Certainly, an accused who was advised by the police while he was in custody that he had a right to consult with an attorney and who exercised that right could not on trial be cross-examined by the prosecutor on the fact that while in custody and in the face of proposed questioning by the police he asked to be permitted to consult with an attorney.

Nor could a defendant be impeached on trial by the fact that he had consulted with an attorney before his arrest. Thus, in United States ex rel Macon v Yeager, 476 F2d 613 (CA3 1972), the defendant, on the morning after the homicide, and before his arrest, called his attorney. The prosecutor on trial in argument to the jury suggested that defendant's calling his attorney was not the act of an innocent man. The Court found that this suggestion was an impermissible infringement of the defendant's constitutional right to assistance of counsel. Se also: Zemina v Solem, 573 F2d 1027 (CA8 1978).

There is quintessentially no difference between the constitutional right to assistance of counsel and the constitutional right to silence which makes exercise by an accused of silence before arrest fair game for impeachment but exercise of the right to assistance of counsel before arrest not.

The reasonings and rationale of the Fifth, Seventh and Ninth Circuit Courts of Appeal, it is respectfully urged, is sounder that that of the Sixth Circuit because

a principle of law that establishes that a person accused of crime who is arrested immediately after the fact, by virtue of that fortuitous circumstance, has the constitutional privilege of withholding from the police the defense he intends to advance on trial but that another person, accused of perhaps the same crime, who is not arrested for that crime until some time after the fact, has an obligation to seek out the police and explain to them the defense he intends to advance on trial under penalty of being damned on trial by his failure to do so, verges on the philosophically absurd and is for that reason untenable and should be rejected.

CONCLUSION

It is respectfully submitted that for the reasons above given, the Order of the Court of Appeals for the Sixth Circuit affirming the judgment of the district court which denied petitioner a writ of habeas corpus is in conflict with the requirements of the Fifth Amendment to the United States Constitution and petitioner's request for a Writ of Certiorari should be granted.

Respectfully submitted,

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Detroit, Michigan
June 4, 1979

79-1011

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS SEAY JENKINS,

Petitioner-Appellant

V.

CHARLES ANDERSON, Warden,

Respondent-Appellee

O R D E R

Before: LIVELY and ENGEL, Circuit Judges and PHILLIPS, Senior Circuit Judge.

Petitioner Dennis Seay Jenkins was convicted in the Recorder's Court of Detroit, Michigan, of manslaughter in the death of one Doyle Redding on August 13, 1974. Having exhausted his state remedies, he filed a petition for writ of habeas corpus in the district court, and having been denied relief there, appeals.

As grounds for relief, Jenkins asserts four alleged deprivations of his rights under the United States Constitution:

1. that he was deprived of his right under the Fifth and Fourteenth Amendments to a fair trial when the prosecutor cross-examined him and the witnesses testifying in his behalf by asking why they did not go to the police and tell them the story of self-defense which they gave at trial;

2. that he was deprived of a fair trial under the

Fourteenth Amendment when the prosecutor accused him of "trafficking" in narcotics;

3. that he was deprived of his right under the Fourteenth Amendment when the trial court accepted a verdict of guilty after purportedly declaring a mistrial, and

4. that he was deprived of his right under the Sixth and Fourteenth Amendments of the United States Constitution to the effective assistance of counsel on trial and on his appeal of right to the Michigan Court of Appeals.

Upon a review of the record, the court is satisfied that none of the contentions has merit.

The most serious issue raised by petitioner is whether cross-examination as to his original silence concerning his defense amounts to a violation of his privilege against self-incrimination as construed in Doyle v. Ohio, 426 U.S. 610 (1976). It appears, however, that unlike the circumstances in Doyle, the petitioner was not questioned concerning his silence while under arrest or otherwise in custody. The petitioner does not complain that his silence was the product of the implicit assurance of Miranda warnings that silence carries no penalty. Doyle, supra, 426 U.S. at 618. We find such a claim foreclosed

by our decision in Bradley v. Jago, No. 78-3236, decided and filed March 27, 1979. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

79-1011

FILED

MAY 29 1979

JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS SEAY JENKINS,

Petitioner-Appellant

V.

CHARLES ANDERSON, Warden

Respondent-Appellee

O R D E R

Before: LIVELY and ENGEL, Circuit Judges and PHILLIPS, Senior Circuit Judge

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the petitioner-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that no issues are raised which have not been previously considered by this court. Accordingly,

IT IS ORDERED that the petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk